

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE HIGHER EDUCATION COORDINATING BOARD

In the Matter of Proposed
Permanent Rules Relating to
Minnesota State Postsecondary
Review Program.

REPORT OF THE
ADMINISTRATIVE LAW JUDGE

The above-entitled matter came on for hearing before Administrative Law Judge Barbara L. Neilson on February 8, 1995, at 9:00 a.m. at the Capitol View Center, 70 West County Road B-2, Little Canada, Minnesota.

This Report is part of a rulemaking proceeding held pursuant to Minn. Stat. §§ 14.131 to 14.20, to hear public comment, determine whether the Minnesota Higher Education Coordinating Board ("the Board") has fulfilled all relevant substantive and procedural requirements of law applicable to the adoption of the rules, evaluate whether the proposed rules are needed and reasonable, and determine whether or not modifications to the rules proposed by the Board after initial publication are substantially different from those originally proposed.

J. P. Barone, Assistant Attorney General, Suite 200, 520 Lafayette Road, St. Paul, Minnesota 55155, appeared on behalf of the Board at the hearing. The Board's hearing panel consisted of Verne Long, Board President; Dr. Leslie Mercer, Director of the Board's Policy and Planning Program Division; and Dr. Paul Thomas, Assistant Director of the Board's Policy and Planning Program Division.

Prior to the hearing, two written comments were received by the Administrative Law Judge from interested members of the public. Twelve persons attended the hearing. Seven persons signed the hearing register. The hearing continued until all interested persons, groups, or associations had an opportunity to be heard concerning the adoption of these rules. The record remained open for the submission of written comments until February 28, 1995, twenty calendar days following the date of the hearing. The Administrative Law

Judge received one written comment on the proposed rules during the post-hearing public comment period. Pursuant to Minn.Stat. § 14.15, subd.1, five business days were

allowed for the filing of responsive comments. The Board submitted a reply letter and attached memorandum to the Administrative Law Judge on March 6, 1995. At the close of business on March 7, 1995, the rulemaking record closed for all purposes. The Board did not propose any amendments to the rules in its post-hearing submission.

The Board must wait at least five working days before taking any final action on the rules; during that period, this Report must be made available to all interested persons upon request.

Pursuant to the provisions of Minn. Stat. §14.15, subd. 3 and 4 (1992), this Report has been submitted to the Chief Administrative Law Judge for his approval. If the Chief Administrative Law Judge approves the adverse findings of this Report, he will advise the Board of actions which will correct the defects and the Board may not adopt the rule until the Chief Administrative Law Judge determines that the defects have been corrected. However, in those instances where the Chief Administrative Law Judge identifies defects which relate to the issues of need or reasonableness, the Board may either adopt the Chief Administrative Law Judge's suggested actions to cure the defects or, in the alternative, if the Board does not elect to adopt the suggested actions, it must submit the proposed rule to the Legislative Commission to Review Administrative Rules for the Commission's advice and comment.

If the Board elects to adopt the suggested actions of the Chief Administrative Law Judge and makes no other changes and the Chief Administrative Law Judge determines that the defects have been corrected, then the Board may proceed to adopt the rule and submit it to the Revisor of Statutes for a review of the form. If the Board makes changes in the rule other than those suggested by the Administrative Law Judge and Chief Administrative Law Judge, it shall submit the rule, with the complete record, to the Chief Administrative Law Judge for a review of the changes before adopting it and submitting it to the Revisor of Statutes.

When the Board files the rule with the Secretary of State, it shall give notice on the day of filing to all persons who requested that they be informed of the filing.

Based upon all the testimony, exhibits, and written comments, the Administrative Law Judge makes the following:

FINDINGS OF FACT

-

PROCEDURAL REQUIREMENTS

A. Prehearing Filings

1. On December 13, 1994, the Board filed the following documents with the Chief Administrative Law Judge:

- (a) a copy of the proposed rules certified by the Revisor of Statutes;
- (b) the Statement of Need and Reasonableness ("SONAR"), with exhibits and appendices;

- (c) the Notice of Hearing proposed to be issued;
- (d) the Authorizing Resolution of the Board;
- (e) the Board's Proposed Order for Hearing;
- (f) a statement that the Board intended to give discretionary additional public notice of the hearing; and
- (g) an estimate of the length of the hearing and the number of persons expected to attend the hearing.

2. On December 16, 1994, the Board mailed the Notice of Hearing to all persons and associations who had registered their names with the Board for the purpose of receiving such notice. On December 16, 1994, the Board also mailed the Notice of Hearing to those additional persons to whom discretionary notice was provided.

3. On January 3, 1995, the Notice of Hearing and the proposed rules were published at 19 State Register 1441.

4. On January 5, 1995, the Board filed the following documents with the Chief Administrative Law Judge:

- (a) the Notice of Hearing as mailed;
- (b) a copy of the State Register pages containing the Notice of Hearing and its proposed rules;
- (c) the Board's certification that its mailing list was accurate and complete as of December 16, 1994;
- (d) the Affidavit of Mailing the Notice to all persons on the Board's mailing list and those persons to whom discretionary notice was given;
- (e) the Notice to Solicit Outside Information published at 19 State Register 221, on August 1, 1994, and all materials obtained from that Notice; and
- (f) copies of all comments received in response to the Notice of Hearing.

B. Nature of the Proposed Rules and Statutory Authority

5. The federal Higher Education Act of 1965, 20 U.S.C. §§ 1099a to 1099a-3 ("HEA"), was amended in 1992 to require states to initiate a State Postsecondary Review Program ("SPRP"). Pursuant to the SPRP, a state unit of government must be selected to be the State Postsecondary Review Entity ("SPRE"). The SPRE must adopt rules that require institutions receiving certain federal student loan funds (known as "Title IV" funds) to meet specified standards. The SPRE is responsible for conducting or coordinating reviews of postsecondary institutions in order to reduce or eliminate incidents of fraud and abuse of Title IV funds.

6. In 1993, Governor Arne Carlson designated the Minnesota Higher Education Coordinating Board as Minnesota's SPRE. SONAR Exhibit 4. Pursuant to that designation, and acting under the authority granted by Minn. Stat. § 136A.04, subd. 1(8) (1992), the Board has proposed these rules to adopt standards for the review of

institutions participating in Title IV student loan programs. Minn. Stat. § 136A.04, subd. 1(8), provides that the Board shall “prescribe policies, procedures, and rules necessary to administer the programs under its supervision.” The Administrative Law Judge concludes that the Board has the general statutory authority to adopt these rules. The question of specific statutory authority for particular rule provisions will be examined where appropriate.

C. Small Business Considerations in Rulemaking

7. Minn. Stat. §14.115, subd. 2 (1992), provides that state agencies proposing rules which may affect small businesses must consider methods for reducing adverse impact on those businesses. In its SONAR, the Board acknowledged that the proposed rule may affect small businesses because there are approximately sixteen private, proprietary business, trade, and correspondence schools that meet the definition of small businesses and noted that it is likely that a number of cosmetology institutions also qualify as small businesses. The Board stated:

The Board considered the impact on small businesses and determined that it will be minimal, because most of the requirements imposed by the proposed rule are requirements all institutions must already comply with, by virtue of participation in Title IV programs. In addition, private proprietary institutions must comply with requirements of Minn. Stat. 141 (Minnesota Rules, Chapter 4880), that already include several of the same requirements proposed in this rule.

SONAR at 99.

8. The Board suggested that the largest impact of the proposed rules on small businesses would be the requirement that they develop a complaint process, if they do not already have one. With respect to the other requirements imposed by the rules, the Board emphasized that institutions will be reviewed and will have to provide the data required by the proposed rule only if they meet one of the review criteria. The Board asserted that federal law generally does not permit institutions to be treated differently unless such a difference in treatment is specifically authorized by law or rule. In the context of the rules governing the SPRP, the Board concluded that the federal laws and regulations do not allow postsecondary institutions meeting the definition of small businesses to be treated differently. No commentator objected to the small business analysis advanced by the Board. The Administrative Law Judge determines that the Board has met the requirements of Minn. Stat. § 14.115, subd. 2.

D. Fiscal Notice

9. Minn. Stat. § 14.11, subd. 1 (1992), requires agencies proposing rules that will require the expenditure of public funds in excess of \$100,000 per year by local public bodies to publish an estimate of the total cost to local public bodies for the two-year period immediately following adoption of the rules. In its SONAR, the Board indicated that there are two publicly-owned hospitals in Minnesota that participate in Title IV loan programs. The Board asserted that, because these institutions are already required to comply with most of the requirements of the proposed rule due to their participation in Title IV programs, the majority of the rule’s impact on local public bodies

arises from existing federal requirements. SONAR at 100. No one disputed the Board's contention. The fiscal notice requirements of Minn. Stat. § 14.11, subd. 1, thus are not applicable to this proceeding.

E. Impact on Agricultural Land

10. Minn. Stat. § 14.11, subd. 2 (1992), requires that agencies proposing rules that have a "direct and substantial adverse impact on agricultural land in the state" comply with the requirements set forth in Minn. Stat. §§ 17.80 to 17.84 (1992). Because the proposed rules will not have a direct and substantial adverse impact on agricultural land within the meaning of Minn. Stat. § 14.11, subd. 2 (1992), these statutory provisions do not apply.

F. Participation in Rule Formulation

11. The HEA (Title IV, Part H, subpart 1, §494C(d)) requires the Board to consult with representatives of Minnesota postsecondary education institutions in planning and implementing the SPRP. The Board took several steps to carry out the consultation requirement. The Board notified postsecondary institutions, governing boards, and other agencies about the SPRP during November and December, 1993. The Board published a notice soliciting outside opinion regarding the SPRP in the State Register in August, 1994. 19 State Reg. 221 (Aug. 1, 1994). The Board also convened an Advisory Group and sought their assistance and input in formulating the proposed rules. The Advisory Group was composed of representatives from the University of Minnesota, the Minnesota Technical College System, the Minnesota Community College System, the Minnesota State University System, the Minnesota Association of Private Post-Secondary Schools, the Minnesota Private College Council, the Minnesota Department of Education, the Minnesota Higher Education Board, Dunwoody Industrial Institute, the Minnesota Department of Commerce, the Minnesota Board of Barber Examiners, the Alfred Adler Institute of Minnesota, and Ramsey County Opportunities Industrialization Center. SONAR Ex. 16.

12. The advisory group met sixteen times between January, 1994, and November, 1994. Specific rule provisions were formulated, rationales for the rule were discussed, and proposed alternatives were debated. In addition, in September, 1994, approximately 450 representatives from Title IV eligible institutions received materials from the Board and were invited to participate in the process. A live teleconference was held on September 16, 1994, which was broadcast to 37 locations in Minnesota. The Board sponsored four other meetings between Board staff and affected institutions in order to further discuss the proposed rule. These meetings were attended by 173 persons on behalf of ninety-three different institutions or system offices. SONAR at 7-8.

SUBSTANTIVE PROVISIONS

A. Analysis of the Proposed Rules

13. The Administrative Law Judge must determine, *inter alia*, whether the need for and reasonableness of the proposed rules has been established by the Board by an affirmative presentation of fact. The Board prepared a Statement of Need and Reasonableness ("SONAR") in support of the adoption of the proposed rules. At the hearing, the Board primarily relied upon its SONAR as its affirmative presentation of

need and reasonableness. The SONAR was supplemented by the comments made by the Board at the public hearing and in its written post-hearing comments.

14. The question of whether a rule is reasonable focuses on whether it has a rational basis. The Minnesota Court of Appeals has held a rule to be reasonable if it is rationally related to the end sought to be achieved by the statute. Broen Memorial Home v. Minnesota Department of Human Services, 364 N.W.2d 436, 440 (Minn.App. 1985); Blocker Outdoor Advertising Company v. Minnesota Department of Transportation, 347 N.W.2d 88, 91 (Minn.App. 1984). The Supreme Court of Minnesota has further defined the burden by requiring that the agency “explain on what evidence it is relying and how the evidence connects rationally with the agency’s choice of action to be taken.” Manufactured Housing Institute v. Pettersen, 347 N.W.2d 238, 244 (Minn. 1984).

15. This Report is generally limited to the discussion of the portions of the proposed rules that received significant critical comment or otherwise need to be examined. Because some sections of the proposed rules were not opposed and were adequately supported by the SONAR, a detailed discussion of each section of the proposed rules is unnecessary. The Administrative Law Judge specifically finds that the need for and reasonableness of the provisions that are not discussed in this Report have been demonstrated by an affirmative presentation of facts, that such provisions do not exceed the statutory authority of the Board, and that there are no other problems that prevent their adoption. Any change proposed by the agency from the rules as published in the State Register which is not discussed in this Report is found not to constitute a substantial change.

B. Section by Section Analysis of Proposed Rule

16. The proposed rule is comprised of nine parts, 4890.0100 through 4890.0900. Several parts contain subparts. The discussion below addresses the portions of the rule that received significant comment or otherwise require attention.

Proposed Rule Part 4890.0100 - Purpose

17. Proposed rule part 4890.0100 sets out the Board’s designation as the SPRE for Minnesota under the HEA. The rule part also identifies the purpose of the State Postsecondary Review Program as conducting and coordinating reviews of referred institutions. The proposed rule is needed and reasonable to limit the scope of the rule to those institutions referred by the U.S. Department of Education or those identified by the Board with the approval of the U.S. Department of Education.

Proposed Rule Part 4890.0300 - Review Criteria

18. This rule part provides that the Board shall review institutions pursuant to 34 C.F.R. §§ 667.5 and 667.6. The Board thus has cited applicable portions of the Code of Federal Regulations in establishing its review criteria for institutions participating in Title IV. The provisions of 34 C.F.R. § 667.5 establish the process used by the U.S. Department of Education to select institutions to be referred for review by a SPRE, and sets out cohort default rates, transfers of institutional assets or liabilities, fluctuations in student statistics, and other criteria used by the U.S. Department of Education to trigger referral. Where these criteria exist, referrals must be made. In

addition, the provisions of 34 CFR § 667.6 establish the process to be used by the SPRE to select institutions for possible review, including procedures the SPRE must use to request approval from the U.S. Secretary of Education to conduct a review, notification to be provided to the affected institution, and avenues for the institution to challenge the SPRE's request. Under the federal regulation, a SPRE may request to review an institution if the SPRE either has reason to believe the institution is engaged in fraudulent practices or if, based on more recent information available to the SPRE, the SPRE determines that the institution meets one or more of the referral criteria.

19. The regulatory system does not provide the SPRE any discretion to act absent referral or approval by the U.S. Department of Education. The standards are set by federal law and regulations. Proposed rule part 4890.0300 has been shown to be needed and reasonable.

Proposed Rule Part 4890.0400 - Board Review

20. Proposed rule part 4890.0400 requires that the Board use the standards in part 4890.0500 to conduct the review of an institution. The rule requires that the review be based upon information from the institution's most recently completed academic year for which the information is available, unless either some other information is expressly required in the rule, or the U.S. Department of Education indicates different information is to be used. The proposed rule is needed and reasonable to specify the standards to be used and the information to be relied upon by the Board in conducting a review.

Proposed Rule Part 4890.0500 - Review Standards

21. The standards for conducting a review of a referred institution are set out in the fourteen subparts of proposed rule 4890.0500. The subparts relating to consumer information, ability to complete, standards of progress, student complaint processes, and performance outcomes will be discussed below.

Subpart 1 - Consumer Information

22. Pursuant to part 4890.0500, subpart 1, of the proposed rule, the Board is required to consider the following points in conducting a review of an institution: (1) the availability of catalogs, admission requirements, course outlines, tuition and fee schedules, course cancellation policies, and student rules, and (2) the accuracy of catalogs and course outlines in reflecting the courses and programs offered by the institution. The review standards require education institutions to comply with several sections of the Code of Federal Regulations, including the standards of administrative capability. See 34 C.F.R. §668.16. These requirements are once again derived from the HEA and federal regulations promulgated under the HEA.

23. Joseph Becker of the Becker Driver Training Facility suggested that the standard set forth in 34 C.F.R. §668.16 was too restrictive with respect to family owned and operated educational institutions. Mr. Becker's primary objection concerns the requirement set forth in the federal regulation that an institution:

[divide] the functions of authorizing payments and disbursing or delivering funds so that no officer has responsibility for both functions with respect to any particular student aided under the programs. For example, the

functions of authorizing payments and disbursing or delivering funds must be divided so that for any particular student aided under the programs, the two functions are carried out by at least two organizationally independent individuals who are not members of the same family, as defined in §668.15, or who do not together exercise substantial control, as defined in §668.15, over the institution.

24. Only those institutions that participate or wish to participate in Title IV programs are subject to the federal or state regulations. Any institution seeking to offer Title IV funds to its students must agree to comply with all the relevant federal rules and statutes. Board Posthearing Comment at 1. The Becker Driving Training Facility is not currently participating in Title IV financial aid programs. Thus, the facility is not subject to the proposed rule. Moreover, the subpart does not impose any requirement that is not already in place for institutions receiving Title IV funds. The subpart has been shown to be needed and reasonable to accomplish the Board's intended purpose.

Subpart 2 - Ability to Complete

25. Pursuant to subpart 2 of the proposed rule, the Board must review an institution's method for assessing prospective students' ability to complete their chosen educational programs. The proposed rule specifies that, in order to be in compliance, the institution must meet the requirements of 34 C.F.R. § 668.7(b) and 20 U.S.C. § 1091(d). The subpart imposes no new substantive obligation on postsecondary institutions and is needed and reasonable to provide notice to affected institutions of the review standards to be used.

Subpart 3 - Standards of Progress and Student Records

26. Subpart 3, item A, requires that the Board review an institution's method of maintaining and enforcing standards relating to progress in academics by students. Item A incorporates standards contained in applicable federal regulations to determine whether the institution has an adequate method to ensure student academic progress. Subpart 3, item B, sets standards for retaining student records and sets forth acceptable methods for ensuring that records are maintained and accessible for fifty years., including the use of surety bonds and mutual agreements. Item B also requires an institution terminating operations to submit information to the Board regarding where the records will be kept. Both items have been shown to be needed and reasonable to ensure that Title IV funds do not go to institutions that lack appropriate safeguards for students.

Subpart 11 - Student Complaint Process

27. Subpart 11 of the proposed rule requires the Board to review an institution's procedures for investigating and resolving student complaints. To be in compliance, educational institutions must establish a student complaint process that includes certain provisions, such as a time frame for completing the process, an appeal process involving an ultimate determination by an official who was not directly involved in the alleged complaint, and a nonretaliation provision. Institutions must also maintain an annual summary of complaints and the manner in which they were handled for each of the most recent five years.

28. As proposed, the rule does not define the term “complaint” but leaves that to each individual institution. Anita Pampusch, President of the College of St. Catherine, objected to the vagueness of the proposed rule and suggested that the rule refer to complaints regarding “wrongs, grievances, or injury pertaining to the standards in part 4890.0500 or any other basis as defined by appropriate federal, state, or local law.” The modification was suggested to ensure that only complaints relevant to Title IV funding be included. President Pampusch commented that the language as proposed would be unduly burdensome to institutions because it could be construed to require institutions to document all kinds of complaints, regardless of their consequence or relationship to the areas which the proposed rule is designed to address. The Board responded that the rule was designed merely to ensure that an institution has developed a process for dealing with complaints and does not attempt to dictate the details of that process. The Board emphasized that the rule would allow one institution to define “complaint” in the manner urged by President Pampusch and would allow another institution to define “complaint” in a different manner. Board’s Posthearing Comment at 2.

29. The Minnesota Supreme Court has stated that “[a] rule is unconstitutionally vague if the words of the rule are not ‘sufficiently specific to provide fair warning’. . . of the type of conduct which is punishable under that rule.” Thompson v. City of Minneapolis, 300 N.W.2d 763, 768 (Minn. 1980), quoting Colten v. Kentucky, 407 U.S. 104, 110 (1972). A rule may be found to be void for vagueness “if it fails to give a person of ordinary intelligence a reasonable opportunity to know what is prohibited or fails to provide sufficient standards for enforcement.” In re Charges of Unprofessional Conduct Against N.P., 361 N.W.2d 386, 394 (Minn. 1985). Although due process “does not require that a rule contain an explicit definition of every term,” it is evident that the rule must “prescribe general principles so that those subject to the rule are reasonably able to determine what conduct is appropriate. Under the “void for vagueness” doctrine, it is also necessary that a law or rule contain sufficient standards governing the exercise of discretion granted by the law or rule to avoid arbitrary or discriminatory enforcement of its provisions. See Papachristou v. City of Jacksonville, 405 U.S. 156 (1972). Vague and open-ended criteria which do not appropriately limit agency discretion have been found to violate due process principles. Holmes v. New York City Housing Authority, 398 F.2d 262, 265 (2d Cir. 1968); Historic Green Springs, Inc. v. Bergland, 497 F. Supp. 839, 854-55 (E.D. Va. 1980).

30. The Administrative Law Judge concludes that the proposed rule is defective due to its failure to define the term “complaint.” By virtue of this failure, regulated institutions do not have fair notice of the nature of the complaints that must be documented or the scope of the review that will be conducted by the Board. The rule as proposed also fails to include standards to guide the Board’s exercise of discretion in deciding whether a particular institution’s complaint procedure is adequate. In order to correct the defect, the Board should adopt language similar to that set forth below:

The Board shall review an institution’s procedures for investigating and resolving student complaints regarding wrongs, grievances, or injuries pertaining to the standards in part 4890.0500. To be in compliance with

this subpart, an institution must publish and follow the procedures in items A and B.

A. An institution shall establish, publish, and document a complaint process to receive, investigate, and respond to student complaints regarding wrongs, grievances, or injuries pertaining to the standards in part 4890.0500. The process must include:

(1) the institution's definition of the term "complaint" within the guidelines above;

* * *

The proposed language clarifies that the type of complaints encompassed within the rule are those relevant to the review criteria established under the SPRP. The language is derived from the language used in proposed rule part 4890.0800, relating to the consumer complaint process to be established by the Board. The modification will facilitate understanding of and compliance with the rule by educational institutions. The rule, as modified, has been shown to be needed and reasonable. The modification was made in response to public comment and does not result in a rule provision that is substantially different from the rule as originally proposed.

Subpart 14, Item C - Performance Outcomes

31. Item C(2) of subpart 14 provides that the Board will review the rate of placement of an institution's graduates in occupations related to educational programs not subject to 34 C.F.R. §668.8(e)(1)(ii). To be in compliance, an institution must verify a placement rate of all graduates in a cohort for each vocational or professional program equal to or greater than 50 percent. Janis Weiss, Ph.D., Vice Chancellor for Academic Affairs for the Minnesota Community Colleges, objected to the promulgation of a new definition of placement rate. Dr. Weiss asserts that the Board has previously established a definition for rate of placement as part of the Minnesota Graduate Follow-Up System and has published a description in a handbook issued in July, 1994, and commented that the proposed rules are unreasonable and will led to confusion in reporting performance outcomes. According to Dr. Weiss, the follow-up system arose from adverse publicity surrounding the use of two different placement rates by the Minnesota Technical College system. She urged the Board to modify the proposed rule by replacing the rate of placement defined in item C(2) with the rate of placement defined in the Minnesota Graduate Follow-Up System. In particular, Dr. Weiss objected to the calculation method for placement of graduates contained in the proposed rules insofar as transfer students who graduate with a two-year degree and immediately enroll in a four-year degree program are considered "failures," even though the two-year program met the student's needs.

32. The Board asserted in response that the proposed rule is reasonable because (1) the reporting requirement of subpart 14(C)(2) includes only graduates of vocational and professional programs and does not include graduates of two-year liberal arts programs; (2) it is appropriate to include graduates of vocational programs in the proposed rule because a major purpose of vocational programs is to prepare

students for employment; (3) the same data is used to determine the placement rate under both the proposed rule and the Minnesota Graduate Follow-Up System; (4) public confusion will not result since the placement rate determined under the proposed rule would only be considered when determining whether an institution is in compliance with the performance outcome standard under the proposed rule; (5) use of the entire cohort of graduates in the denominator of the calculation is reasonable because it accounts for all graduates from each program and avoids distortion of the resulting data; (6) under subpart 14, item E, institutions can document outcomes other than employment for their graduates and show that graduates achieved other goals; and (7) the Advisory Group, which included a representative from the Minnesota Community College System, reached consensus that it preferred to establish a threshold of 50 percent of all graduates. Board Comment at 4

33. It is unlikely that public confusion will result since the placement rate will only be calculated under the proposed rule for use in determining whether the institution is in compliance with the performance outcome standard. The institution will be given the opportunity under item E of subpart 14 of the proposed rules to explain any anomalous outcomes. The Administrative Law Judge thus determines that the Board has demonstrated that the proposed rule is needed and reasonable.

Proposed Rule Part 4890.0700 - Priority System for Reviewing Institutions

34. Proposed rule part 4890.0700 sets forth procedures for notifying institutions of reviews, initiating reviews, duration of reviews, reports, responses, appeals, and notifications to the U.S. Department of Education. No one objected to this provision of the proposed rule. The standards are needed and reasonable to clarify for institutions and the Board the process that will be followed.

Proposed Rule Part 4890.0800 - Consumer Complaint Process

35. The HEA requires each SPRE to establish a complaint process regarding the review standards in part 4890.0500 and maintain records of complaints received. 20 U.S.C. § 1099a-3(j). Subpart 1 of the proposed rule notes this requirement and specifies that the Board will maintain records regarding the number and nature of complaints for each institution. In addition, subpart 2 of the proposed rule provides that complaints relating to Title IV programs be submitted in writing, unless fraud is alleged. The Board will refer individuals alleging fraud to the Inspector General of the U.S. Department of Education. The rule addresses data practices issues, sets timelines for Board response, allows the Board to follow-up on complaints, and provides that a "pattern of complaints" will be found to be established when fifteen complaints are received from an institution of 1,500 students or less within a twelve-month period or, for institutions of more than 1,500, a number of complaints equal to the enrollment multiplied by .01 (rounded to the nearest whole number) is received within a twelve-month period. The standard to be met to establish a pattern of complaints was discussed in the task force meetings and arrived at by considerations of fairness to institutions of all sizes. No one objected to the standard. The Board has demonstrated that the proposed rule is needed and reasonable.

Legislative Intent of Congress

36. At the hearing, David L. Laird, President of the Minnesota Private College Council, objected to the application of the proposed rules to private colleges and universities in Minnesota. President Laird cited the historically low default rate of loan repayment by students at those institutions and the existence of significant safeguards to prevent fraud and abuse as reasons for exempting private colleges and universities from the requirements of the rules. President Laird urged that the Board be required to show that each portion of the rule would reduce fraud and abuse.

37. The requirements of the HEA and the rules promulgated thereunder do not distinguish between institutions on the basis of their past history or the existence of internal procedures to prevent fraud or abuse. Federal law authorizes the Secretary of the U.S. Department of Education:

to enter into agreements that (1) designate one State postsecondary review entity in each State to be responsible for the conduct or coordination of the review . . . for the purposes of determining eligibility under this subchapter . . .; and (2) to provide Federal funds to each State postsecondary review entity for performing the functions required by such agreements with the Secretary.

20 U.S.C. §1099a(a). The regulations promulgated by the Secretary of the U.S. Department of Education under the above provision of the HEA provide:

[t]he purpose of the program is to reduce fraud and abuse in the Title IV, HEA programs through development of State standards for, and State oversight and review under those standards of, institutions referred by the Secretary under § 667.5 or selected by a State postsecondary review entity under § 667.6.

34 C.F.R. § 667.1.

38. Federal laws and regulations have provided specific parameters for the creation and authority of a state's SPRE. The regulations proposed by the Board have primarily been used to provide necessary details to the more broadly written federal law. The Board has, for the most part, incorporated in the proposed rules the standards that federal laws and regulations impose on institutions participating in Title IV programs. The Board is entitled to rely upon the legislative findings that Congress has made as to the propriety of requiring institutions to comply with the HEA and the rules promulgated under that statute. The Board has emphasized that many of the specific provisions of the proposed rules are in accordance with advice received from the Secretary of Education, Richard J. Riley. Secretary Riley and his staff have issued a number of advisory letters suggesting that specific approaches be taken by SPREs in establishing the SPRP. Since the proposed rules relate only to participation in Title IV programs, and the ultimate authority over the administration of those programs rests with the Secretary of Education, it is reasonable for the Board to rely upon Secretary Riley's advice. The Administrative Law Judge concludes that the Board's reliance on federal laws, regulations, and advisory letters is reasonable and appropriate. Reliance upon Secretary Riley's advice does not render the proposed rules defective absent a showing that his advice is contrary to the governing statute or rules. Such a showing has not been made.

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Minnesota Higher Education Coordinating Board gave proper notice of this rulemaking hearing.

2. The Board has fulfilled the procedural requirements of Minn. Stat. §§ 14.14, subds. 1, 1a, and 2 (1992), and all other procedural requirements of law or rule so as to allow it to adopt the proposed rules.

3. The Board has demonstrated its statutory authority to adopt the proposed rules and has fulfilled all other substantive requirements of law or rule within the meaning of Minn. Stat. §§ 14.05, subd. 1, 14.15, subd. 3, and 14.50 (i) and (ii) (1992), except as noted at Finding 30.

4. The Board has demonstrated the need for and reasonableness of the proposed rules by an affirmative presentation of facts in the record within the meaning of Minn. Stat. §§ 14.14, subd. 2, and 14.50 (iii) (1992).

5. There were no additions or amendments to the proposed rules which were suggested by the Board after publication of the proposed rules in the State Register. Accordingly, the rules as finally proposed for adoption are not substantially different from the proposed rules as published in the State Register, within the meaning of Minn. Stat. § 14.15, subd. 3, and Minn. Rules 1400.1000, subp. 1, and 1400.1100 (1993).

6. The Administrative Law Judge has suggested action to correct the defect cited at Conclusion 3 as noted at Finding 30.

7. Due to Conclusion 3, this Report has been submitted to the Chief Administrative Law Judge for his approval pursuant to Minn. Stat. §14.15, subd. 3 (1992).

8. Any Findings which might properly be termed Conclusions and any Conclusions which might properly be termed Findings are hereby adopted as such.

9. A Finding or Conclusion of need and reasonableness in regard to any particular rule subsection does not preclude and should not discourage the Board from further modification of the proposed rules based upon an examination of the public comments, provided that no substantial change is made from the proposed rules as originally published, and provided that the rule finally adopted is based upon facts appearing in this rule hearing record.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS HEREBY RECOMMENDED that the proposed rules be adopted with the modification suggested above.

Dated this ____ day of April, 1995.

BARBARA L. NEILSON
Administrative Law Judge

Reported: Tape Recorded; No Transcript.